Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	)	
Implementation of the Telecommunications Act of 1996	)	**CC Docket No. 96-115**
Telecommunications Carriers' Use of Customer Proprietary Network Information And Other Customer Information	)	
Implementation of the Non-Accounting Safeguards of Section 271 and 272 of The Communications Act of 1934, As Amended	)	**CC Docket No. 96-149**

REPLY COMMENTS OF
THE ASSOCIATION OF COMMUNICATIONS ENTERPRISES

The Association of Communications Enterprises ("ASCENT"), through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules,[1] hereby responds to selected comments of other parties submitted in response to the *Second Further Notice of Proposed Rulemaking*, FCC 01-247, released September 7, 2001, in the captioned proceedings ("*Second Notice*"). In its comments on the *Second Notice*, ASCENT addressed only the interplay between Section 222 and Section 272 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"),[2] responding to Commission inquiries regarding the

[1] 47 C.F.R.§ 1.415.

[2] 47 U.S.C. §§ 222, 272.

need to alter its "fundamental conclusion that [Bell Operating Companies ("BOCs")] may share CPNI with their 272 affiliates pursuant to Section 222 without regard to the nondiscrimination requirements of Section 272" if it were to adopt an "opt-out" approach to govern carrier use and disclosure of "customer proprietary network information" ("CPNI").[3] ASCENT will likewise address here only those comments of other parties dealing with the interplay between Sections 222 and 272 of the Act.

[3] Second Notice, FCC 01-247 at ¶ 25.

In its comments, ASCENT argued that the Commission "should revisit . . . [its] interpretation of the interplay between Sections 222 and 272 if . . . [it] adopt[ed] an opt-out approach,"[4] and for that matter, if it retained an "opt-in" approach, because the basis for the Commission's holding that Section 272 did "not impose any additional CPNI requirements on BOCs' sharing of CPNI with their Section272 affiliates when they share information with their Section 272 affiliates according to the requirements of Section 222"[5] was erroneous. As ASCENT pointed out the "apparent conflict" between Section 222 and Section 272 which the Commission sought to resolve simply did not exist. Moreover, ASCENT continued, the concern expressed by the Commission that the "application of the section 272 nondiscrimination requirements" would "severely constrain[] or even negate[]" the "sharing of customer CPNI among those related entities that provide service to the customer,"[6] was unfounded. And finally, ASCENT demonstrated that basic tenets of statutory construction confirm, rather than argue against, application of the Section 272 nondiscrimination requirements to carrier use and disclosure of CPNI.

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[4] Id. at ¶ 26.

[5] Id. at ¶ 25.

[6] Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information And Other Customer Information (Second Report and Order), 13 FCC Rcd 8061, ¶ 158 (2001).

BellSouth Corporation ("BellSouth"), Qwest Services Corporation ("Qwest"), SBC Communications Inc. ("SBC"), and the Verizon telephone companies ("Verizon") (collectively, the "BOC Commenters") all voice a different view in their comments. According to Qwest, a holding by the Commission that the Section 272 nondiscrimination requirements apply to carrier use and disclosure of CPNI "would be not only arbitrary and capricious but constitutionally infirm."[7] Moreover, Qwest continues, "[a] reconciliation of the statutory provisions, such that Section 222 controls all affiliate sharing of CPNI (whether BOC or not) once necessary customer approvals are secured, is the best legal and policy resolution."[8] And, Qwest concludes, "[e]ven if Section 272(c)(1) had some relevance to CPNI usage and sharing between a BOC and its Section 272 affiliate, Congress' determination that 'joint marketing and sale of services permitted under [272(g)(3)] shall not be considered to violate the nondiscrimination provisions' of (c)(1) would wrest CPNI 'information' from the hard grasp of Section 272(c)(1)'s nondiscrimination obligation regarding the sharing of 'information'."[9] SBC concurs, adding only the contentions that the Commission's prior analysis of the interplay of Sections 222 and 272 "did not depend on its adoption of an opt-in approach," and that Section 272 does not reach carrier "use" of CPNI.[10] BellSouth echoes SBC's view of the rationale underlying the Commission's earlier interpretation of Sections 222 and 272, and joins with Verizon, which adds that disclosure of CPNI to unaffiliated entities would potentially violate Section 222(c), in endorsing Qwest's constitutional, statutory and

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[7] Qwest Comments at 23.

[8] Id. at 23 - 24.

[9] Id. at 26.

[10] SBC Comments at 16.

policy contentions.[11]

Initially, Qwest's contention that the Commission, simply because it had previously held that carrier use and disclosure of CPNI was not subject to Section 272's nondiscrimination requirements, is now "not in a position to change course" is baseless. As the United States court of Appeals for the District of Columbia recently held, "[w]e do not believe that the Commission should be prevented from stating the law correctly merely because it may have misconstrued the applicable rules in the past."[12] In the case in which it so declared, the Court not only upheld a Commission finding that local exchange carriers ("LECs") had wrongfully imposed end user common line charges on independent payphone providers even though the agency had previously held that its rules permitted, indeed, required, imposition of those charges, but sanctioned imposition by the Commission of retroactive liability on LECs for so doing.

[11] BellSouth Comments at 8 - 10; Verizon Comments at 7 - 12.

[12] Verizon Telephone Companies v. Federal Communications Commission, No. 00-1207, slip op. 2 (D.C.Cir. 2001).

The BOC Commenter's constitutional claims fare no better, primarily because they prove too much. None of the BOC Commenters has suggested that an opt-out approach is constitutionally infirm, yet applying the Section 272 nondiscrimination requirements to carrier use and disclosure of CPNI in an opt-out environment would impose no greater restriction on a Bell Operating Companies' ("BOC") commercial speech than would application of the general opt-out mechanism. Application of the Section 272 nondiscrimination requirements to CPNI would simply require BOCs to share CPNI with competing providers pursuant to the opt-out authority generally applicable to the use and disclosure of such information. And contrary to SBC's claims,[13] the "substantial government interest" in applying the Section 272 nondiscrimination requirements to all information, including CPNI, is manifest. Even the United States Court of Appeals for the Tenth Circuit in vacating the Commission's implementation of Section 222(c) recognized that "the broad purpose of the Telecommunications Act of 1996 is to foster increased competition in the telecommunications industry,"[14] and, as recognized by the Commission, "[t]he structural and nondiscrimination safeguards contained in section 272 ensure that competitors of the BOC's section 272 affiliate have access to essential inputs, namely, the provision of local exchange and exchange access services, on terms that do not discriminate against the competitors and in favor of the BOC's affiliate . . . enabl[ing] a new competitor to compete effectively."[15] No Court has suggested that the public interest furthered by Section 272's nondiscrimination requirements is other than substantial.

The BOC Commenters' statutory construction arguments are no more persuasive.

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[13] SBC Comments at 23.

[14] U.S. WEST, Inc. v. Federal Communications Commission, 182 F.3d 1224, 1237 (10th Cir. 1999), *cert. denied* 120 S. Ct. 2215 (June 5, 2000).

[15] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended (First Report and Order), 11 FCC Rcd 21905, ¶ 13 (1997) (*subsequent history omitted*).

The BOC Commenters generally assert that the Section 272 nondiscrimination requirements are overwhelmed by the "more specific" restrictions on carrier use and disclosure of CPNI contained in Section 222. This argument is predicated on two false assumptions – *i.e.*, that full enforcement of one provision precludes full enforcement of the other, and that Section 222 is the "more specific" of the two provisions. With respect to the latter assumption, Section 222 applies to all carriers while Section 272 applies only and specifically to BOCs. Section 222 restricts use and disclosure of CPNI by all carriers, including the BOCs, while Section 272 imposes additional requirements on BOC use and disclosure of information, including CPNI. The first assumption is erroneous because Sections 222 and 272 are designed to achieve wholly different, but fully compatible, objectives. Customer control over CPNI can be preserved while fully enforcing Section 272's nondiscrimination requirements. Customers merely need to be made aware before they grant it that the authority they explicitly or implicitly provide to BOCs to use and disclose their CPNI encompasses the sharing of such information with both affiliated and unaffiliated entities.

The BOC Commenters' claims that the "joint marketing" exceptions embodied in Section 272(g)(3) insulate CPNI from the nondiscrimination provisions of Section 272 also fail. Initially, the argument, even if correct, accomplishes nothing. Section 272(g)(3) only relieves BOCs from the nondiscrimination requirements of Section 272(c), it does not relieve BOCs of their obligations under Section 272(e)(2) which requires them to provide information to unaffiliated entities on the same terms and conditions it is provided to affiliated entities.[16] But the BOC Commenters' claims are not correct because they read Section 272(g) far too broadly. Section 272(g) allows BOCs and their affiliates to market their respective services together as a bundled

[16] 47 U.S.C. §§ 272(c), 272(e)(2), 272(g)(3).

offering.[17] It does not relieve BOCs of any and all nondiscrimination obligations simply because they are arguably related to the marketing of telecommunications services. Such a broad reading of Section 272(g) would effectively eviscerate the Section 272(c) nondiscrimination requirements because virtually all activities engaged in by BOCs and their affiliates, including the dissemination of information regarding new services and new facilities, could be argued to be associated with the marketing of their respective services.

The BOC Commenters' policy arguments are no more compelling. For example, it is irrelevant that BOCs enter the in-region, interLATA market with no market share. Section 272 is designed to prevent abuse of market power in the local exchange/exchange access market where the BOCs continue to exercise market power. The BOC Commenters' suggestions that application of the Section 272 nondiscrimination requirements to carrier use and disclosure of CPNI would present an insurmountable burden for BOCs are facially meritless, particularly in an opt-out environment. As ASCENT pointed out in its comments, in an opt-out regime, Section 272, as well as Section 222, could be satisfied through transmission of a single notice to customers which provided them with the option of blocking disclosure of their CPNI to both BOC affiliates and unaffiliated competitors; even in an opt-in environment, approval applicable to BOC affiliates and unaffiliated competitors could be readily obtained through the same request mechanism. And, as ASCENT further pointed out in its comments, such an approach is consistent with information disclosure approval mechanisms adopted by other federal agencies.

[17] 47 U.S.C. § 272(g).

Miscellaneous "toss-in" arguments raised by the BOC Comments do not advance their position any further. Contrary to Verizon's contentions, for example, Section 222(c)(2) does not prohibit disclosure of CPNI to unaffiliated entities in the absence of an affirmative written request by the customer. Section 222(c)(20 imposes a disclosure obligation on carriers, preventing them from refusing to honor a customer request that they provide another entity with the customer's CPNI.[18] Section 222(c)(2), accordingly, does not constitute a further limitation on the disclosure of CPNI beyond that set forth in Section 222(c)(1). Also lacking in merit is the BOC Commenters' claim that a distinction can be drawn between "use" and "provision" of CPNI. Whether CPNI is given to an affiliate or used for the benefit of an affiliate, the activity falls squarely within any rational definition of the "provision of information." Indeed, the perceived need by the BOC Commenters to resort to a reading of Section 272 which negates its very purpose -- *i.e.*, to avoid preferential treatment by BOCs of their affiliates -- only serves to confirm the hollowness of their position. And SBC's suggestion that the Commissions analysis of the interplay between Sections 222 and 272 was not inextricably linked to its adoption of an opt-in mechanism to govern carrier use and disclosure of CPNI is belied by the Commission's own words. In the *Second Notice*, the Commission recognized expressly that its conclusions regarding the impact on the BOCs of the extension of Section 272's nondiscrimination requirements were made "in the context of an opt-in approach."[19]

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[18] 47 U.S.C. § 222(c).

[19] Second Notice, FCC 01-247 at ¶ 26.

By reason of the foregoing, ASCENT once again urges the Commission to urges the Commission to revisit its interpretation of the interplay between Section 222 and Section 272, whether or not it moves from an opt-in to an opt-out or a opt-in/opt-out approach, and to henceforth apply the nondiscrimination requirements of Section 272 to carrier use and disclosure of CPNI with full force.

Respectfully submitted,

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